In the High Court of Judicature at Madras

Dated : 15.11.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice N.SATHISH KUMAR

Civil Miscellaneous Appeal No.2651 of 2018 & CMP.No.19995 of 2018

The Commissioner of Central
Excise, Coimbatore-18 ...Appellant/Respondent

Vs

M/s.Sree Saradhambal Automobiles
Pvt. Ltd., Coimbatore-45 ...Respondent/Appellant

APPEAL under Section 35G of the Central Excise Act, 1944 against final order No.40928 of 2018 in Appeal No.ST/43/2010 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 22.3.2018.

For Appellant : Mr.K.S.Ramasamy
For Respondent: Ms.D.Naveena

JUDGMENT

Judgment was delivered by T.S.SIVAGNANAM,J

We have the learned counsel on either side.

2. This appeal by the Revenue under Section 35G of the Central Excise Act, 1944 is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, the Tribunal) dated 22.3.2018 in Appeal No.ST/43/ 2010. The Revenue has filed this appeal raising the following substantial question of law :

> "The Tribunal being creation of the Statute, whether it can traverse beyond the provisions of the CENVAT Credit Rules, 2004, when the same has the force of a Statute ?"

3. There are two issues involved in this appeal, though only one substantial question of law has been raised by the Revenue with regard to demand of interest on the ineligible credit availed by the assessee. The said issue is no longer res

integra, as it has been decided in favour of the Revenue by a Division Bench of this Court, to which, one of us (TSSJ) was a party, in the case of CCE Vs. M/s.Sundaram Fastners Limited [CMA.No. 3477 of 2010 dated 30.1.2014]. The relevant portions of the said judgment read as hereunder :

> "7. The next question which falls for consideration is as to whether the assessee is liable to pay interest under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944?
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> 8. The said issue came up for consideration before the Hon'ble Supreme Court in the case of Union of India vs. Ind-Swift Laboratories Ltd., reported in 2011 (265) ELT 3 (SC). In the said case, the High Court read down the Rule to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly and interest should not be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. The assessee's case in this appeal is that the credit has been reversed. Therefore, mere wrong availment will not attract payment of interest as reversal of credit would amount to "no credit" being taken. The Hon'ble Supreme Court held that the High Court misread and misinterpreted Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. It further pointed out that a statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal and Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service and the issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the said High Court. Further, the Hon'ble Supreme Court, reading the provision as a whole found that there was no reason to read

the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded as the word "AND". It was further held that on the happening of any of the three circumstances viz., credit taken or credit utilized wrongly or credit has been erroneously refunded, then such credit becomes recoverable along with interest. Further, the Hon'ble Supreme Court held that so far as Section 11 AB of the Act is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, it observed that the High Court in the said case erroneously held that the interest can be claimed from the date of wrongful availment of CENVAT Credit and it should only be payable from the date when CENVAT Credit is wrongly utilized.

9. The learned counsel appearing for the assesee sought to distinguish the decision of the Hon'ble Supreme Court in the case of IND-SWIFT LABORATORIES LTD. by stating that, that was a case where the CENVAT credit was taken and utilized and not a case where CENVAT credit has been reversed as that of the case of the assessee herein. It is his further submission that reversal of credit would amount to "no credit" being taken. In this regard, reliance has been placed on the decision of Allahabad High Court in the case of Hello Minerals Water (P) Ltd., vs. Union of India reported in 2004 (174) ELT 422 (All.), the decision of the Karnataka High Court in the case of Commissioner of C.Ex. & S.T., LTU. Bangalore vs. Bill Forge Pvt.Ltd reported in 2012 (279) ELT 209 (Kar.) and the decision of the Hon'ble Apex Court in the case of Chandrapur Magnet Wires (P) Ltd. vs. Collector of C.Excise, Nagpur reported in 1996 (81) ELT 3 (SC).

10. We do not agree with the submissions made by the learned counsel for the assessee, as the decisions rendered in the aforesaid cases by the Allahabad High Court as well as the Karnataka High Court as well as the Hon'be Supreme Court, arose out of a case where the assessee claimed benefit

of an exemption notification. The question which fell for consideration in those cases is as to whether reversal of credit after the removal of the final product would entitle the assessee therein to the benefits of exemption notification, which states that the reversal of the credit should be done before the removal of the products. In such circumstances, the Courts considered the issue and said that for the purpose of extending the benefits of exemption notification, the time of reversal was not the material and reversal of the credit would amount to "no credit" being taken. In these decisions, Rule 14 or Section 11AB was not the subject matter for consideration. Therefore, these decisions relied upon by the learned counsel for the assessee are clearly distinguishable by facts, while read in the context of the facts and relevant notification which are applicable to the facts of the case.

11. The one and only decision which concerns about Rule 14 is the decision reported in 2011 (265) ELT 3 (SC), where the Hon'ble Supreme Court in paragraph No.17 has clearly pointed out that on the happening of any of the three situations viz., credit taking credit, utilizing it wrongly or erroneously refunding the credit, becomes recoverable along with interest. In paragraph Nos.16 and 17 of the said Judgment, the Hon'ble Apex Court has observed as follows:-

"16.A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature of provision of Section 11AB would apply for effecting such recovery.

17. We have very carefully read the impugned order and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been

taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole, we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "AND". On the happening of any of the three circumstances such credit becomes recoverable along with interest".

12. In the light of the above findings of the Hon'ble Apex Court, particularly with regard to Rule 14 of the Act, we do not find any justifiable ground to accept the plea of the assessee based on the decisions relied on by the assessee reported in 1996 (81) ELT 3 (SC), 2004 (174) ELT 422 (All.), and 2012 (279) ELT 209 (Kar.)

13. The learned counsel for the assessee submitted his notes on the contention that interest being compensatory

> and that question of payment of interest would arise only where the principal is due. To that contention, by placing reliance on the decision reported in 1996 (88) ELT 12 (SC) (Prathiba Processors vs. Union of India as well as the decision reported in 2007 (215) ELT 3 (CCE vs. Bombay Dyeing), the learned counsel for the assessee contended that, when credit has been reversed before utilization, the same did not amount to taking credit.
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> 14. We reject the arguments of the assessee. In the said decisions, it has been no doubt held that interest is compensatory and the question arises only where principal is due. If one gets into the background of the scheme of Modvat Credit, his contention that the assessee has taken credit, does not merit consideration, particularly so, in the background of Rule 14. As it stands today, one has to go only by the provisions contained in Rule 14 and nothing beyond."

4. In the light of the above referred to decision, the finding rendered by the Tribunal with regard to levy of interest calls for interference.

5. Ms.D.Naveena, learned counsel appearing for the respondent - assessee submits that the Tribunal had considered the plea raised by the assessee pointing out that the matter should be remitted back to the Adjudicating Authority for recalculating their liability in terms of Rule 6(3AA) of the CENVAT Credit Rules, 2004 and that once such liability is recalculated on remand, they would be eligible for the same.

6. The said contention of the learned counsel for the respondent - assessee is opposed by the learned Standing Counsel for the appellant by contending that there cannot be any proportionate eligibility of credit in respect of services availed only for trading purposes. Before us, the learned Standing Counsel for the appellant would contend that Rule 6 (3AA) of the said Rules would have no application to the facts of the case.

7. We refrain ourselves from expressing any opinion at this juncture, since the Tribunal remanded the matter to the Adjudicating Authority for de novo consideration to arrive at the net liability of the assessee after calculating the same in terms of Rule 6(3AA) of the said Rules. Since jurisdictional issue has also been raised by the Revenue, the Adjudicating

Authority shall also consider the submissions of the Revenue as regards applicability of Rule 6(3AA) of the said Rules during de novo consideration.

8. With the above observation and direction, the appeal filed by the Revenue is allowed. No costs. Consequently, the connected CMP is closed.

-s/d-
Assistant Registrar(CS-IX)

True Copy

Sub-Assistant Registrar

RS

To
1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench,
No.26, Sastri Bhavan Annexe Building, Haddows Road, Chennai-6.

2. The Commissioner of Central Excise
Customs and Service Tax
6/7 A.T.D. Street, Race Course Road
Coimbatore 641 018.

3. The Chief Commissioner of Central Excise
Coimbatore.

4. The Deputy Commissioner of Central Excise
Coimbatore.

5. The Deputy Commissioner
Coimbatore III Division.

6 The Superintendent of Central Excise
Range III A, Coimbatore III Division.

+1 CC to Mr.S. Durairaj, Advocate sr 77872.
+1 CC to Mr.K.S.Ramasamy, Advocate sr 77917.

CMA.No.2651 of 2018&
CMP.No.19995 of 2018

SR(CO)
SP(04/12/2018)